Chicago-Kent Law Review

Volume 50 | Issue 1 Article 10

January 1973

Constitutional Law--Sex Discrimination--The Female High School Athlete

Candace Fabri

CONSTITUTIONAL LAW—SEX DISCRIMINATION—THE FEMALE HIGH SCHOOL ATHLETE—*Bucha v. Illinois High School Association,* 351 F. Supp. 69 (N.D. Ill. 1972).

In recent years women of varying ages and inclinations have sought to be accorded equality and recognition in all arenas of life.[1] Perhaps the newest and most interesting field in which women are competing for equality and recognition is in the area of athletics. Today's young women realize the benefits of athletic activity in developing physical and mental fitness, and in preparing for collegiate and professional opportunities. However, today's young women also realize that there is a great disparity in the athletic facilities and appropriations for males and females.[2]

On the collegiate level women athletes are making great strides toward the goal of implementing effective athletic programs as budgets, competitive schedules and facilities are being increased.[3] Commensurate increases, however, are not indicated on the high school level.[4] In high schools across the nation females are still relegated to noncompetitive, nonconcentrated, intramural type programs.[5] Within this context, four recently rendered decisions are signficant in that they delineate the right of female high school athletes to participate on male interscholastic athletic teams. The decision which synthesizes and collates much of the prevailing judicial thought in this area is *Bucha v. Illinois High school Association.*[6]

The Handbook for the Illinois High School Association enumerates the following goals for the high school sports program: "to stress the cultural values, the appreciations and skills involved in all interscholastic activities, and to promote cooperation and friendship."[7] However, the

1. Gerber, "The Changing Female Image: A Brief Commentary on Sport Competition for Women," Journal of Health, Physical Education and Recreation, 59 (1971).

2. *Id.*

3. Chicago Tribune, November 5, 1972, § 3, at 1, col. 1; November 6, 1972, § 3, at 3, col. 2; November 7, 1972, § 3, at 1, col. 3; November 8, 1972, § 3, at 1, col. 3, a series discussing sex discrimination in collegiate athletics indicating that in the past year the appropriations for female athletics at Michigan State University increased from three thousand to fifty thousand dollars per year.

4. Interview with Mr. Harold Trapp, Athletic Director of Niles Township High School System, Skokie, Illinois on October 19, 1972. The net cost of the girls' athletic program was $3,548 and expenditures for the boys' program were $47,495.

5. Gregorio v. Board of Education of Asbury Park N.J. Superior Court-Appellate Div., A-1277-70, April 5, 1971; Hollander v. Connecticut Interscholastic Athletic Association, No. 12497 (Superior Ct. of Conn., New Haven County, 1971); found in "Education: "Sports" Women's Rights Law Reporter, 1, (Spring 1972). *See also* Harris v. Illinois High School Association, No. 72-25 (S.D. Ill. April 17, 1972).

6. 351 F. Supp. 69 (N.D. Ill. 1972).

7. Illinois High School Association Handbook, Article I.

Association's by-laws, in a very real sense, subvert these goals. Females are prohibited from participating in interscholastic sports activities in both contact and noncontact sports.[8] This by-law has recently been amended to permit interscholastic activity in noncontact sports subject to certain restrictions emphasizing the intramural aspects of the sports.[9] Mixed competition in athletics between members of opposite sexes is completely prohibited.[10]

Because of these by-laws, Sandra Bucha, an accomplished female swimmer at Hinsdale Township High School, was denied eligibility for the male varsity interscholastic swimming team. In *Bucha v. Illinois High School Association,* she argued that this denial of eligibility was a violation of the fourteenth amendment guarantees of equal protection[11] and constituted a deprivation of a right for which civil redress is provided by 42 U.S.C. 1983.[12] The suit was filed and accepted as a class action[13] seeking three remedies: a determination that the IHSA by-laws are violative of equal protection guarantees and thereby unconstitutional; an injunction prohibiting the enforcement of these by-laws; and twenty-five thousand dollars in damages.[14] The court found no violation of equal protection concepts and granted summary judgment for the defendant, the Illinois High School Association.

The fourteenth amendment and 42 U.S.C. 1983 furnish the basis of a claim for relief only when the questioned regulation can be construed to be state action. No protection is afforded from the discriminatory practices promulgated by private institutions or organizations.[15] The defendant, IHSA,

8. *Id.* By-law A-II-14 (as amended): No school belonging to this Association shall permit girls to participate in interscholastic athletic contests with the following exceptions: Interscholastic contests in archery, badminton, bowling, fencing, golf, gymnastics, swimming, tennis, and track and field may be permitted.

9. *Id.* The restrictions for girls athletic programs include a prohibition on organized cheering, a one dollar limitation on the value of awards, and a prohibition on overnight trips in conjunction with girls contests.

10. *Id.* There shall be no mixed athletic competition between boys and girls.

11. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

12. 42 U.S.C. 1983 (1970): Every person who, under color of any state statute, ordinance, regulation, custom, or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

13. Fed. R. Civ. P. 23(a). Prerequisites to a class action: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that the joinder of all members is impracticable, (2) there are questions of law or fact common to all the class, (3) the claims or defenses of the representative are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

14. Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971).

15. *See generally,* Developments in the Law of Equal Protection, 82 Harv. L. Rev. 1065 (1969); Note Constitutional Law—Equal Protection and Sex Based Classification, 1972 Wisc. L. Rev. 626 (1972).

is a voluntary affiliation of Illinois high schools which is not directly funded by the Illinois Department of Public Instruction. However, the activities of voluntary high school associations like the IHSA have been adjudicated to be actions taken under color of state law.[16] The requisite state action is clearly manifested in that the very existence of the association is dependent upon the support and cooperation of the public school system. The member schools are tax-supported institutions that cannot violate the rights of their students without being subject to judicial review. Consequently, the enforcement of the association rules by the member schools may have a substantial impact on the rights of the students enrolled in these tax-supported institutions. This *de facto* state action is sufficient to warrant application of the federal protections.[17]

Three other significant decisions are illuminating in a discussion of the *Bucha* case. *Reed v. Nebraska High School Association,*[18] *Brendan v. Independent School District 742,*[19] and *Haas v. South Bend Community School Corporation*[20] reached a very different result from the *Bucha* decision, though not necessarily a different conclusion. These three cases from neighboring jurisdictions were also predicated on the fourteenth amendment equal protection guarantees and 42 U.S.C. 1983.[21] For purposes of an effective analysis these cases may be juxtaposed with each other and discussed as an integrated totality.

The *Bucha* opinion correctly noted that "when dealing with an alleged denial of equal protection it is necessary first to define the nature of the right asserted."[22] This is essential because judicially evolved precedents indicate two distinct bases on which fourteenth amendment questions may be analyzed.[23] The first basis may involve either a fundamental (constitutionally guaranteed or legislatively protected) right, or an inherently suspect (constitutionally offensive) classification that is invidiously discriminatory. Each will necessitate active judicial scrutiny[24] which tests the legislation, regulation, or classification by measuring it against the corresponding state interest. The infringement of a fundamental right or the utilization of an inherently suspect classification can only be upheld upon con-

16. Mitchell v. Louisiana High School Athletic Association, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Association v. Bray, 321 F.2d 269 (10th Cir. 1963).

17. *See* note 14 *supra.*

18. 341 F. Supp. 258 (D. Neb. 1972).

19. 342 F. Supp. 1224 (D. Minn. 1972).

20. 289 N.E.2d 495 (Indiana Supreme Court, 1972).

21. Haas v. South Bend Community School Corporation alleges a denial of the Indiana Constitutional guarantee, Article I § 23. The General Assembly shall not grant to any citizen privileges or immunities which upon the same terms not equally belong to all.

22. *Supra* note 6, at 73.

23. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

24. *See* note 15 *supra.*

clusive demonstation of a compelling state interest.[25] Conceptually, this test is the synthesis of cases dealing with constitutional questions as varied as the imposition of economic regulations and the right of free speech.[26]

The second basis upon which fourteenth amendment questions may be analyzed is employed in all other cases. Thus, cases that do not deal with fundamental rights or invidious discrimination are subjected to permissive judicial review.[27] This is a less stringent standard requiring that the classification or legislation be well founded upon a rational basis that is reasonably related to the objective intended.[28] This type of permissive review is utilized in the female athlete cases under discussion. The right to participate in athletic activity is not considered fundamental and the use of the sex classification is not inherently suspect as invidious discrimination.[29]

I. Participation in Interscholastic Athletics Is Not a Fundamental Right

The Supreme Court undisputedly indicates in *Brown v. Board of Education of Topeka*[30] and *Tinker v. Des Moines Independent Community School District*[31] that students are granted protection of fundamental rights based on Constitutional guarantees or legislative provisions. *Brown* holds that a public school student has a fundamental right to be free from racial discrimination as effectuated by a *de jure* segregated school system. *Tinker* holds that a school board cannot infringe upon a student's fundamental right of free speech in the absence of a compelling state interest that necessitates the interference. These cases stand for the proposition that "the Constitution does not stop at the public school door like a puppy waiting for its master, but instead follows the student through the corridors and into the classrooms."[32] However, it does not follow the student onto the athletic field.

Federal courts have noted:

> Only those rights secured by the Constitution or some Act of Congress are within the protection of the federal courts. Rights not derived from them are left exclusively to the protection of the states. The privilege of participating in interscholastic athletics must be deemed to fall within the latter category.[33]

The response of the state courts has been equally consistent. They gen-

25. *Id.*
26. *See* note 23 *supra.* Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).
27. *See* note 15 *supra.*
28. *Id.*
29. *See* notes 6 and 19 *supra.*
30. 347 U.S. 483 (1954).
31. 393 U.S. 503 (1969).
32. Dunham v. Pulsifer, 312 F. Supp. 411, 417 (D. Ver. 1970).
33. *See* note 16 *supra.*

erally refuse to recognize any right to participate in extra-curricular activities. They find, as one court expressed, that "the right to attend public schools and receive an education cannot properly be said to include interscholastic sports and games."[34]

Despite this theory, both *Reed* and *Haas* argue that that the right the female students are asserting is not simply the right to swim or the right to golf. Rather, they argue that their right is the right to be treated the same as boys where a program for swimming or golfing has been provided for boys only.[35] This is consistent with the reasoning in *Brown* which did not find that the Negro children had a right to be educated, but found that under the fourteenth amendment they had a right to be educated equally with non-Negro children where the educational program was sponsored by the state. The analogy to the *Brown* holding is striking, as the plaintiffs did not seek to establish a program for female athletes, instead they sought to be eligible for a program of athletic activity provided only for boys. This argument was not considered in *Bucha,* as the IHSA amended it's by-laws to permit interscholastic programs for both males and females immediately following the commencement of the suit. Thus, in *Bucha,* the question of whether the right to participate in interscholastic athletics is a fundamental right became moot.

II. Sex Classifications Are Not Invidious Discrimination

Through the gradual evolution of judicial precedent various bases for legislative classifications have been determined to be inherently suspect as invidious discrimination, that is, by their very nature unreasonable and in violation of Constitutional or legislative provisions. These categories of judicially determined invidious discrimination are race,[36] national origin,[37] alienage,[38] and poverty.[39] A classification predicated on any one of these factors is so inherently offensive to our Constitutional guarantees that it immediately dictates active judicial scrutiny. The state action can only be upheld upon proof of a compelling state interest.

Sex has not been placed in this invidious category, and three recent cases implicitly indicate the reluctance of the Supreme Court to make this determination. In *Alexander v. Louisiana*[40] and *In re Stanley v. Illinois,*[41] more than one constitutional question was presented and the Court followed

34. State ex rel. Lawrence v. Indiana High School Athletic Association, 240 Ind. 124, 162 N.E.2d 250, 255 (1959); Bruce v. South Carolina High School League, 189 S.E.2d 817 (S.C. 1972).
35. *See* notes 18 and 20 *supra.*
36. Bolling v. Sharp, 347 U.S. 497 (1954).
37. Korematsu v. United States, 323 U.S. 214 (1944).
38. Graham v. Richardson, 403 U.S. 365 (1971).
39. Harper v. Va. Board of Elections, 383 U.S. 663 (1966).
40. 405 U.S. 625 (1971).
41. 405 U.S. 645 (1971).

its "usual custom of avoiding decisions of constitutional issues unnecessary to the decision of the cases before us."[42] In *Alexander*, a Negro appealed a criminal conviction because women and Negroes had been excluded from the jury. In *In re Stanley*, an unwed father was denied custody of his children without the notice and hearing provided by statute for unwed mothers. Although both plaintiffs argued that the sex classification in each case should be judicially determined to be an invidious discrimination, the Court disposed of *Alexander* on the basis of racial discrimination and *Stanley* on the basis of denial of due process.[43]

The most definitive statement of the Court regarding this issue is the opinion in *Reed v. Reed*.[44] The Court was presented with an Idaho statute that automatically gave preference to fathers over mother where both filed letters for appointment as administrators of a decedent's estate. The announced intent of this statute was to minimize litigation in this area.[45] In reaching its decision the Court applied the permissive test of a rational basis for the classification reasonably related to the object of the statute. The Court further noted that the fourteenth amendment does not prohibit the states from treating different classes of persons in different ways. This test was enunciated:

> The classification must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[46]

The Supreme Court did not determine that the sex based classification was an invidious discrimination. The Court rather determined that the sex classification had no reasonable relation to the objective of the Idaho statute. *Reed v. Reed* inescapably indicates that the correct standard in reviewing sex based classifications is the permissive, rational basis and reasonable relationship test.

Classification based on sex has deep roots in our legislative history. Sex classifications founded on physiological or psychological differences have been judicially accepted as rational in cases protecting women from working long hours,[47] participating in hazardous activities,[48] earning low

42. 405 U.S. at 633.

43. *Id.* at 634. Mr. Justice Douglas, concurring. "I am convinced we should also reach the constitutional question of the exclusion of women from jury service. The issue was squarely presented, it has been thoroughly argued and is of recurring importance. The Court purports to follow our usual custom of avoiding unnecessary constitutional issues, but that cannot be the sole rationale for both questions are of constitutional importance. We could as easily say that deciding the constitutionality of excluding women from juries renders it unnecessary to reach the question of racial exclusion."

44. 404 U.S. 71 (1971).

45. *Id.* at 76.

46. *Id.*

47. Muller v. Oregon, 208 U.S. 412 (1908).

48. Radice v. New York, 264 U.S. 292 (1924).

wages,[49] serving in the armed forces,[50] and registering for mandatory jury duty.[51] These roots, however, are being cut away by equalizing legislation such as the Civil Rights Act of 1964[52] which prohibits sex discrimination in job hiring in the absence of a bona fide occupational qualification. In Illinois, the Fair Employment Practices Act has been amended to prohibit discrimination on the basis of sex.[53] As a result, courts and government agencies can no longer mechanically accept sex classification in employment as rational and thereby constitutionally valid. They must investigate to determine if the sex classification is bona fide and rests on a basis of difference that is real and tangible, not specious or fanciful[54]

This critical attitude has been expanded upon by the Supreme Court of California. In *Sail'er Inn v. Kirby*,[55] it became the first court in the nation to declare that in dealing with a woman's right to be *employed*, sex must be treated as an invidious discrimination under the fourteenth amendment guarantees. Thus, the sex classification or denial of employment opportunity can only stand where a compelling state interest necessitates it. The California court reasoned that sex, like race, is a highly visible characteristic beyond an individual's control. Large numbers of males and females are stereotyped without regard for the individual's ability to perform and contribute to society. In California "the pedestal upon which women have been placed has been revealed, upon closer inspection, to be a cage."[56]

The impetus of *Sail'er Inn* has prompted courts to reject the traditional sex based classifications in various areas, including the disparity of criminal sentences between men and women,[57] separate male and female employment classified sections in the newspapers,[58] and different male and female employment benefits.[59] Although sex classifications are not inherently suspect

49. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

50. Hoyt v. Florida, 368 U.S. 57 (1961).

51. United States v. St. Clair, 291 F. Supp. 122 (D.C.N.Y. 1968).

52. 42 U.S.C. 2000 (1964): It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . this shall not apply if there is a bona fide occupational qualification . . .

53. Ill. Rev. Stat. Ch. 48, §§ 851; *see also* Illinois Constitution, Article I, §§ 18: The equal protection of the laws shall not be denied or abridged on account of sex by the state or its units of local government and school districts; and Illinois Legislative Council, Springfield, File 7-992 (RB:pb), (Oct. 21, 1971) at 4, defeated house bill for equal protection of laws in school districts.

54. *See, e.g.*, Seidenberg v. McSorley's Old Ale House, 308 F. Supp. 1253 (S.D.N.Y. 1969); McCrimmon v. Daley, 418 F.2d 366 (7th Cir. 1969).

55. 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).

56. 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529, 554.

57. U.S. ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

58. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972).

59. Bravo v. Board of Education for the City of Chicago, 345 F. Supp. 155 (1972).

as invidious discrimination in the vast majority of jurisdictions, a judicial trend is emerging that emphasizes the necessity for thoughtful and thorough examination of the evidence upon which the classification is grounded. Mr. Justice Holmes said "the Fourteenth Amendment does not create a fictitious equality where there is a real difference",[60] but our democratic system will no longer tolerate the acceptance of a fictitious difference where there is a real equality.

III. Sex Classifications: The Evidentiary Basis

Widely accepted assumptions predicated on physiological and psychological differences between the sexes form the basis for the traditional sex based classifications. These assumptions have especially influenced legislation affecting young males and females. For example, until recently, many states had a three year dispartiy between males and females for the age of majority;[61] most states had a two year dispartiy for the determination of persons in need of supervision;[62] and some states had a one year disparity for the benefits of their juvenile court proceedings.[63] These disparities were founded on the assumption that females mature at a faster rate than males, but are now being eliminated as the result of empirical evidence.[64] Similarly, in the Seventh Circuit, male high school students have successfully argued that separate male and female dress codes preventing only the males from wearing long hair styles was a violation of equal protection concepts.[65]

However, the physiological assumptions upon which the female athletic cases are predicated have not been repudiated. The *Bucha* court was forced to weigh and evaluate the physiological evidence indicative of a rational basis for separate male and female teams. A wealth of evidence of varying weight and credibility was educed for the *Bucha* trial. The defendant introduced affidavits from coaches and educators favoring the separate athletic program. The court took judicial notice that "at the pinnacle of all sporting contests, the Olympic games, the men's times in each event are consistently better than the women's."[66] In addition, the court noted that the times of the two male swimmers sent to the state championship contest from the Hinsdale Township High School were better than those ever recorded by Ms. Bucha. However, this type of evidence was severely questioned in *Haas* where the court indicated:

> Such evidence cannot support a conclusion that the male sex is athletically superior. An objective observer could not determine

60. Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912).
61. Jacobson v. Lenhart, 30 Ill. 2d 225, 195 N.E.2d 638 (1964).
62. A v. City of New York, 31 N.Y.2d 83, 286 N.E.2d 432 (1972).
63. People v. Pardo, 47 Ill. 2d 420, 265 N.E.2d 656 (1970).
64. Ill. Rev. Stat. ch. 37 §§ 701-2 (uniform age for Juvenile Court Act); Ill. Rev. Stat. ch. 3 §§ 131 (uniform age of majority).
65. Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970).
66. *See* note 6 *supra.*

> which of two opposing armies was superior by examining the strongest and bravest soldier in each. For constitutional purposes, the investigation would necessarily focus on the causes of any differential in relative performance of male and female athletes.[67]

The evidence the *Bucha* opinion relied upon most heavily was presented by an expert medical witness at the *Brendan* trial.[68] The evidence indicated that men are taller than women and stronger by reason of greater muscle mass. Men have larger hearts than women and their deeper breathing capacity enables them to utilize oxygen more efficiently than women. They run faster than women because of the construction of the pelvic area.[69]

Reed, Brendan, and *Haas* were not class actions and the courts chose to ignore this evidence. This is particularly important as the named plaintiffs in those cases presented impressive credentials on the athletic field which clearly brought them beyond the scope of average female ability.[70] Each court noted that the female plaintiff was not within the perameter of the average female athlete. However, *Bucha* was argued as a class action, and medical testimony as indicated above was strongly probative for that court which evaluated the ability of all female athletes, not the ability of the exceptional ones.

Juxtaposed with this evidence of a rational basis for separate male and female programs is medical and sociological evidence that there is no rational basis for the separate programs. The plaintiff, in *Bucha,* presented evidence of a trial study of a male-female integrated athletic program in New York, which was presented to the American Medical Association Committee on the Medical Aspects of Sport.[71] This New York study was instituted as the result of a suit by a female athlete seeking to participate on the varsity team which was limited to males only by the rules of the New York Board of Regents. The decision in the action was delayed until sufficient research could be gathered to form the basis of a factual determination.

The study was conducted in one hundred New York high schools for a sixteen month period from March 1, 1969 to June 30, 1970. Female athletes were permitted to participate on male interscholastic sports teams. The experiment was closely controlled and the participants were subjected to regular medical and psychological examinations. The results of the

67. *Supra* note 20, at 503.

68. *See* note 19 *supra.*

69. *But see,* Hay "Sex Determination in Putative Female Athletes" 221 J.A.M.A. at 998 (August, 1972); Brown, "Effects of Cross-country Running on Preadolescent Girls", Research Laboratory, V.A. Hospital, Livermore, California; Zaharieva, "Olympic Participation by Women, Effects on Pregnancy and Childbirth", 221 J.A.M.A. (August, 1972).

70. *Supra* note 19, at 1226; *Supra* note 18, at 263; *Supra* note 20, at 496.

71. G. Grover, "Girls on Boys' Athletic Teams: Report of an Experiment by the New York State Education Department" (1969), Endorsed by the American Medical Association Committee on the Medical Aspects of Sport.

study revealed no adverse effects on the students. A comprehensive survey indicated that 84% of the male team members, 99% of the female team members, 93% of the team members parents, and 86% of the coaches were in favor of the continuation and expansion of the integrated mixed athletic program.[72] After the submission of this empirical data to the New York Board of Regents, a mixed athletic program in noncontact sports was adopted.[73] This mixed varsity program has continued in conjunction with separate male and female programs.[74] The *Bucha* court found that this conflict of evidence regarding the results of mixed athletic competition mandated judicial restraint in the area "where even the experts disagree."[75]

In attempting to place *Bucha* in context with the other three decisions it is necessary to underscore two essential factual distinctions. *Bucha* was a class action, and the testimony and evidence regarding female athletes as a class was determinative. Secondly, *Bucha* was decided after the IHSA by-law prohibiting female interscholastic competition had been amended. As there was a female athletic program available for Ms. Bucha (an opportunity that the plaintiffs in *Reed, Brendan,* and *Haas* had been denied) the rational basis for the classification was acceptable. This reasoning is explained in *Haas*:

> By denying females the opportunity to participate on varsity athletic teams in interscholastic competition the rule in effect prohibits females from participating in interscholastic athletics altogether. Although the difference in athletic ability is a justifiable reason for the separation of male and female athletic programs, that justification does not exist when only one program is provided.[76]

Because Illinois provides two programs, male and female, the IHSA was able to advance a valid justification for denying females eligibility for male teams. The effect of permitting the mixed competition would be to amalgamate both teams with females eligible for the male teams and vice versa. The predictable result of this combined team would be male dominance. It would operate to discourage and exclude females from beneficial athletic activities. This argument cannot be advanced where there is only one program available for boys only, but it is highly persuasive where there are two programs.

IV. The Emerging Trend

The principal case, *Bucha v. Illinois High School Association,* is consistent with judicial precedent in accepting as rational the sex based classi-

72. *Id.* at 10.
73. *Id.*
74. *Id.* at 14: these recommendations and changes should in no way diminish or be substituted for girls interscholastic athletic teams.
75. *Supra* note 6, at 75.
76. *Supra* note 20, at 496.

fication of the IHSA by-laws. But *Reed, Brendan,* and *Haas* are noteworthy in their departure from this traditional approach. All three found that the physiological differences between young men and women provide a rational foundation for separate high school athletic programs. Yet all three carved out exceptions to the rational classification for Peggy Brendan, Debbie Reed, and Johnell Haas. The effect of finding the classification rational in fact, but irrational in application to the named plaintiffs, is to define a subgroup of exceptional female athletes. These three courts clearly reject the traditional statistical approach to sex based classifications, and this rejection can have far reaching repercussions. For example, if courts were to look beyond statistical compilations regarding the longevity, size, strength, and occupational preference of women they would be free to carefully reevaluate or repudiate discrepancies between males and females in life insurance rates,[77] weightlifting regulations,[78] educational institutions[79] and occupational opportunities.[80] Undoubtedly exceptional persons, both male and female, have suffered from the statistical approach to sex classifications. The existence of male octogenearians, female weightlifters, male secretaries, and female wrestlers has been consistently ignored by judicial review.

The three decisions discussed above represent judicial foresight in admitting both the exception and the rule. Title VII and its "exception" where there is a bona fide occupational qualification, and the exceptions delineated by *Haas, Brednan* and *Reed* represent judicial and legislative attempts to save the sex classifications from being overinclusive. The remedial approach, the construction of a subclassification to which the general proposition does not apply, is a clear judicial and legislative recognition of individual differences and rights. Certainly this exception approach would be unnecessary if the Equal Rights Amendment is ratified, or if the Supreme Court makes a determination that sex is an invidious form of discrimination. But it may be argued that the exception approach deals more equitably with each individual, male and female, than would the two alternatives.

CANDACE FABRI

77. *See* Kanowitz, "Constitutional Aspects of Sex-Based Discrimination in American Law", 48 Neb. L. Rev. 131 (1968).

78. *See* Waldman, "Changes in Labor Force Activity of Women", 93 Mo. Lab. Rev. 10 (June 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Ill. Rev. Stat. ch. 48 § 851; *see generally* U.S.E.E.O.C., 29 C.F.R. ch. 14 § 1604.

79. *See* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970); *accord* Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958); *but see* Kirsten v. Board of Directors of University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

80. State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956); Calzadilla v. Dooley, 286 N.Y.S.2d 510, 29 A.2d 152 (1968).